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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
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9 United States of America,

10 Plaintiff,

11 v.

12 Marco Salomon-Macias,

13 Defendant.
14

No. CR-15-01557-001-PHX-DLR

ORDER

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16 Before the Court is Defendant's Motion for Judgment of Acquittal. (Doc. 86.)
17 The motion is fully briefed. For the reasons below, the motion is denied.

18 **BACKGROUND**

19 On July 22, 2016, after a jury trial, Defendant Marco Salomon-Macias was found
20 guilty of Attempted Reentry of a Removed Alien, 8 U.S.C. § 1326(a) and (b)(1). On
21 August 19, 2016, Defendant moved for judgment of acquittal pursuant to Fed. R. Crim. P.
22 29, (Doc. 86), arguing that the evidence adduced at trial was insufficient to prove beyond
23 a reasonable doubt that Defendant crossed into the United States with the specific intent
24 to enter the country free from official restraint.

25 During trial, Border Patrol Agent (BPA) George Rodriguez testified that on the
26 morning of October 16, 2015, he was sitting in a marked Border Patrol truck along the
27 U.S.-Mexico border when he saw Defendant climb over the border fence and walk
28 directly toward him. (Doc. 85 at 21.) Rodriguez drove toward Defendant, and when they

1 met, BPA Rodriguez got out of his vehicle, identified himself, and began to question
 2 Defendant. (Doc. 85 at 22.) According to BPA Rodriguez, Defendant admitted that he
 3 jumped the border fence, that he knew it was illegal to jump the fence, and that he did not
 4 have documents allowing him to legally be in the United States. (*Id.*) Rodriguez also
 5 testified that Defendant said he was going to Yuma. (*Id.* at 24.) After Defendant was
 6 apprehended and transported to the Yuma Border Patrol Station, BPA John Brooks
 7 interviewed him. Agent Brooks also testified that Defendant said he planned to travel to
 8 Yuma, Arizona. Defendant signed an affidavit denying any fear or concern about being
 9 returned to Mexico. (Doc. 87-1.)

10 When Defendant testified at trial, he denied telling the agents that he planned on
 11 travelling to Yuma, Arizona. He said that he crossed the border out of fear because
 12 someone in Mexico flashed a handgun at him. Defendant also stated that he asked BPA
 13 Rodriguez for help. According to BPA Rodriguez's testimony, Defendant did not tell
 14 him about an alleged incident involving a gun or ask for assistance. (Doc. 85 at 26-27.)

15 **LEGAL STANDARD**

16 Under Rule 29, the Court "must enter a judgment of acquittal on any offense for
 17 which the evidence is insufficient to sustain a conviction." Fed. R. Crim. P. 29(a). "The
 18 evidence is sufficient to support a conviction if 'viewing the evidence in the light most
 19 favorable to the prosecution, any rational trier of fact could have found the essential
 20 elements of the crime beyond a reasonable doubt.'" *United States v. Milwitt*, 475 F.3d
 21 1150, 1154 (9th Cir. 2007) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)).

22 **DISCUSSION**

23 The Ninth Circuit has identified the elements of the crime of attempted illegal
 24 reentry as:

- 25 (1) the defendant had the purpose, i.e., conscious desire, to reenter
 26 the United States without the express consent of the Attorney General; (2)
 27 the defendant committed an overt act that was a substantial step towards
 28 reentering without that consent; (3) the defendant was not a citizen of
 the United States; (4) the defendant had previously been lawfully denied
 admission, excluded, deported or removed from the United States; and (5)

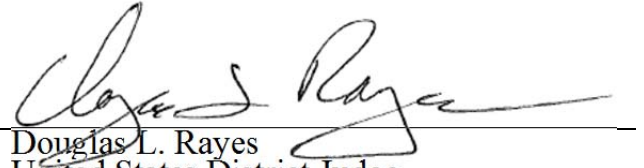
1 the Attorney General had not consented to the defendant's attempted
2 reentry.

3 *United States v. Gracidas-Ulibarry*, 231 F.3d 1188, 1196 (9th Cir. 2000) (en banc); *see*
4 *also United States v. Lombero-Valdovinos*, 429 F.3d 927, 928 (9th Cir. 2005) (“[b]ecause
5 an alien has not ‘reentered’ unless he has done so free from official restraint, the
6 requirement of specific intent for this attempt crime means that to be found guilty, a
7 defendant must have the specific intent to reenter free from official restraint.”). If a
8 defendant crosses the border with the intent only to be imprisoned, it is impossible to
9 convict the defendant for attempted illegal reentry. *Lombero-Valdovinos*, 429 F.3d at
10 928. If a defendant intends to sneak into the country and changes his plans only when he
11 is spotted by border patrol, however, he is guilty of the offense. *Id.* at 930.

12 Viewing the evidence in the light most favorable to the prosecution, the Court
13 finds that rational jurors could have found that Defendant climbed over the border fence
14 to enter the United States with the intent to travel to Yuma. Two witnesses testified that
15 Defendant admitted to them that was his intent. Defendant’s behavior was also
16 inconsistent with someone who feared for his life and was seeking protective custody
17 given that he casually walked toward Border Patrol—he did not run and seek the help of
18 BPA Rodriguez or report any threats. (Doc. 87 at 5.) Defendant initially denied any fear
19 of returning to Mexico and presented no other evidence tending to establish the
20 credibility of having a handgun “flashed” at him. Further, in light of the other evidence,
21 the fact that Defendant did not flee from arrest does not lend credibility to his claim that
22 he entered the United States to avoid harm. Based on the testimony of both Border Patrol
23 agents that Defendant told them that he intended to go to Yuma, and Defendant’s own
24 signed affidavit denying any fear of being returned to Mexico, a rational trier of fact
25 taking the evidence in the light most favorable to the prosecution could have found
26 beyond a reasonable doubt that the Defendant entered the United States with the specific
27 intent to be free from official restraint.
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1 **IT IS ORDERED** that Defendant's Motion for Judgment of Acquittal, (Doc. 86),
2 is **DENIED**. Sentencing set for October 24, 2016, at 9:00 a.m. is **AFFIRMED**.

3 Dated this 29th day of September, 2016.

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9 Douglas L. Rayes
10 United States District Judge
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